

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

AMERICAN RIVERS, et al.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
INTERIOR, et al.,

Defendants.

No. C05-2086P

ORDER ON DEFENDANTS'
MOTION TO DISMISS AND
PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT

In this action, Plaintiffs are challenging interim final rules promulgated jointly by the Departments of Interior, Agriculture, and Commerce pursuant to the Energy Policy Act of 2005. Plaintiffs allege that: (1) Defendants issued the rules in violation of the notice and comment requirements of the Administrative Procedure Act (APA); and (2) the rules result in an impermissible retroactive application of the Energy Policy Act.

Two dispositive motions are currently pending before the Court: (1) Defendants' motion to dismiss (Dkt. No. 22); and (2) Plaintiffs' motion for summary judgment (Dkt. No. 23). The Court has reviewed the papers and pleadings submitted by the parties and has heard oral argument on the pending motions. Being fully advised, the Court ORDERS as follows:

(1) The Court GRANTS Defendants' motion to dismiss Plaintiffs' claim that Defendants issued the rules in violation of the APA's notice and comment requirements. The Court finds that the

1 rules are exempt from the APA's notice and comment requirements because they are procedural and
 2 interpretative rules. Because it is not necessary for the Court to consider matters outside the pleadings
 3 in ruling on this claim, the Court dismisses this claim under Rule 12(b)(6).

4 (2) The Court GRANTS summary judgment in favor of Defendants on Plaintiffs' claim that
 5 the rules result in an impermissible retroactive application of the Energy Policy Act. Although
 6 Defendants moved for dismissal of this claim under Rule 12(b)(6), the Court has considered materials
 7 outside the pleadings that were submitted by both sides in considering this claim, including materials
 8 that Plaintiffs submitted in support of their motion for summary judgment. Therefore, the Court
 9 grants summary judgment to Defendants on this claim under Rule 56.

10 (3) The Court DENIES Plaintiffs' motion for summary judgment.

11 The reasons for the Court's order are set forth below.

12 **Background**

13 1. The Energy Policy Act of 2005

14 On August 8, 2005, the President signed into law the Energy Policy Act of 2005, Pub. L. 109-
 15 58. This litigation concerns rules that Defendants promulgated to implement Section 241 of the Act.
 16 Section 241 includes three subsections.

17 First, Section 241(a) amended section 4(e) of the Federal Power Act (FPA). Section 4(e) of
 18 the FPA authorizes the Federal Energy Regulatory Commission (FERC) to issue licenses for
 19 hydropower projects. See 16 U.S.C. § 797(e). Section 4(e) includes the following provisions for
 20 licensing hydropower projects within "reservations:"¹

21 [L]icenses shall be issued within any reservation only after a finding by the Commission that
 22 the license will not interfere or be inconsistent with the purpose for which such reservation was

23 ¹ The FPA defines "reservations" as "national forests, tribal lands embraced within Indian
 24 reservations, military reservations, and other lands and interests in lands owned by the United States,
 25 and withdrawn, reserved, or withheld from private appropriation and disposal under the public land
 laws; also lands and interests in lands acquired and held for any public purposes; but shall not include
 national monuments or national parks." 16 U.S.C. § 796(2)

1 created or acquired, and shall be subject to and contain such conditions as the Secretary of the
2 department under whose supervision such reservation falls shall deem necessary for the
adequate protection and utilization of such reservation.

3 16 U.S.C. § 797(e). The Energy Policy Act adds the following language to this provision of Section
4 4(e) to allow parties to license proceedings to request “trial-type” hearings to resolve disputed issues
5 of material fact with respect to conditions for hydropower licenses in reservations:

6 The license applicant and any party to the proceeding shall be entitled to a determination on the
7 record, after opportunity for an agency trial-type hearing of no more than 90 days, on any
8 disputed issues of material fact with respect to such conditions. All disputed issues of material
9 fact raised by any party shall be determined in a single trial-type hearing to be conducted by the
10 relevant resource agency in accordance with the regulations promulgated under this subsection
and within the time frame established by the Commission for each license proceeding. Within
11 90 days of the date of enactment of the Energy Policy Act of 2005, the Secretaries of the
Interior, Commerce, and Agriculture shall establish jointly, by rule, the procedures for such
expedited trial-type hearing, including the opportunity to undertake discovery and cross-
examine witnesses, in consultation with the Federal Energy Regulatory Commission.

12 Pub. L. 109-58, § 241(a).

13 Second, Section 241(b) of the Act amended Section 18 of the FPA. Section 18 provides that
14 FERC shall require a hydropower licensee to construct, operate, and maintain “such fishways as may
15 be prescribed by the Secretary of the Interior or the Secretary of Commerce, as appropriate.” 16
17 U.S.C. § 811. Section 241(b) of the Energy Policy Act amended Section 18 by adding substantially
18 the same provisions cited above to permit agency trial-type hearings to resolve disputed issues of
19 material fact with respect to fishway prescriptions.

20 Finally, Section 241(c) of the Act added a new section 33 to the FPA. The new section applies
21 in cases where the secretary of the applicable department: (1) deems a condition to be necessary under
22 Section 4(e) of the FPA to protect a reservation; or (2) prescribes a fishway under Section 18. In such
23 cases, the new section provides that “the license applicant or any other party to the license proceeding
24 may propose an alternative” condition under Section 4(e) or prescription under Section 18.

25 The new section 33 provides that the secretary of the appropriate department must accept a
proposed alternative condition under Section 4(e) if the secretary determines, based on substantial

1 evidence, that the alternative condition provides for the adequate protection and utilization of the
2 reservation and that the proposed alternative would either (i) cost significantly less to implement; or
3 (ii) result in improved operation of the project works for electricity production. Similarly, the
4 secretary of the appropriate department must accept a proposed alternative fishway prescription under
5 Section 18 if the secretary determines, based on substantial evidence, that the alternative fishway
6 prescription will be no less protective than the fishway initially prescribed by the secretary and that the
7 alternative would either (i) cost significantly less to implement; or (ii) result in improved operation of
8 the project works for electricity production.

9 2. Rules Issued by Defendants

10 The Energy Policy Act of 2005 required the Departments of Interior, Agriculture, and
11 Commerce to issue rules within 90 days to establish the procedures for the “expedited trial-type
12 hearings” allowed by Sections 241(a) and (b). On November 17, 2005, the departments jointly issued
13 interim final rules to implement Section 241. See 70 Fed. Reg. 69804 (Nov. 17, 2005).

14 Defendants issued the interim final rules without a prior notice and comment period.
15 Defendants justified this decision on the grounds that section 553(b)(A) of the APA provides that
16 “interpretative rules and rules of agency procedure or practice, like the regulations in these interim
17 final rules, do not require a notice of proposed rulemaking.” 70 Fed. Reg. at 69815. In addition,
18 Defendants asserted that the rules fell within the “good cause” exception to the APA’s notice and
19 comment requirements. Id. Significantly for the purposes of the pending motions, the interim final
20 rules also provided that the new rights set forth in Section 241 were “being made available
21 immediately to any license applicant or other party to a license proceeding for which the license has
22 not already been issued as of the effective date of these rules.” 70 Fed. Reg. at 69805.

23 3. Litigation in this Court

24 Plaintiffs filed this lawsuit on December 16, 2005. Plaintiffs allege: (1) Defendants violated the
25 APA by issuing the interim final rules without prior public notice and comment; and (2) the regulations

1 should be set aside under the APA as arbitrary, capricious, or contrary to law because they result in an
2 impermissibly retroactive application of the Energy Policy Act of 2005.

3 Early in the litigation, Plaintiffs moved to compel production of the administrative record for
4 the rulemaking. Defendants opposed this motion, arguing that Plaintiffs' complaint was subject to
5 dismissal under Rule 12(b)(6) and it would not be necessary to review the administrative record to rule
6 on such a motion. The Court held that it could not resolve this dispute in the abstract and therefore:
7 (1) denied Plaintiffs' motion to compel; and (2) directed Defendants to file a motion to dismiss. (Dkt.
8 No. 18). The Court indicated that "[i]f after reviewing the motion to dismiss, the Plaintiffs continue to
9 maintain that the motion cannot be determined without the administrative record, Plaintiffs may raise
10 that issue in their response to the motion." Id. at 1-2.

11 In response to Defendants' motion to dismiss, Plaintiffs filed a combined opposition brief and
12 cross-motion for summary judgment. In their response, Plaintiffs have not argued that the
13 administrative record is required to resolve their claims.

14 **Analysis**

15 1. The APA's Notice and Comment Requirements

16 The Court first considers Plaintiffs' claim that Defendants issued the interim final rules in
17 violation of the notice and comment requirements of the APA. With some exceptions, the APA
18 requires an agency to follow "notice and comment" procedures before issuing final rules. These
19 requirements include: (1) publishing notice of the proposed rule-making in the Federal Register; and
20 (2) providing a period for interested persons to comment on the proposed rule, which will be
21 considered by the agency prior to adopting the rule. See 5 U.S.C. § 553(b) & (c).

22 However, the APA provides that the notice and comment requirements do not apply:

- 23 (A) to interpretative rules, general statements of policy, or rules of agency organization,
24 procedure, or practice; or
25

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

5 U.S.C. § 553(b)(A) & (B). The Ninth Circuit has held that exceptions to the notice and comment requirements “will be ‘narrowly construed and only reluctantly countenanced.’” Alcaraz v. Block, 746 F.2d 593, 612 (9th Cir. 1984).

Defendants argue that the final rules are exempt from the notice and comment requirements because they are procedural and interpretative. They also argue that the rules are subject to the “good cause” exception to the notice and comment requirement. However, Defendants note that it will not be necessary to consider the good cause exception if the Court finds that the rules are procedural and/or interpretative. Plaintiffs argue that several provisions of the rules are neither procedural or interpretative. Plaintiffs also maintain that the “good cause” exception is not applicable.

A. “Procedural” or “Interpretative” Nature of the Rules

In large part, the interim final rules establish procedures for conducting the agency trial-type hearings permitted by the Energy Policy Act – for example, rules for pre-hearing discovery, hearing procedures, and the like. As a result, Defendants argue that most of the regulations are procedural and therefore exempt from the notice and comment requirements of the APA. To the extent the regulations are not procedural, Defendants argue that the rules are interpretative, and therefore also exempt from the APA’s notice and comment requirements.²

The APA’s notice and comment requirements apply to “substantive” or “legislative” rules. The Ninth Circuit has described “substantive” rules as follows:

For purposes of the APA, substantive rules are rules that create law. These rules usually implement existing law, imposing general, extrastatutory obligations pursuant to authority properly delegated by Congress.

² The question of whether the rules are procedural or interpretative is a matter that can be decided as a matter of law by referring to Plaintiffs’ complaint, the Energy Policy Act of 2005, the challenged rules, and the legal arguments of the parties.

1 Southern Cal. Edison Co. v. FERC, 770 F.2d 779, 783 (9th Cir. 1985).

2 By contrast, “procedural rules” include “technical regulation of the form of agency action and
3 proceedings.” Id. (internal quotations omitted). The Ninth Circuit has “rejected the notion that
4 procedural rules with a substantive impact are subject to the notice and comment requirements.” Id.
5 “Interpretative rules” are rules that “merely clarify or explain existing law or regulations and go ‘to
6 what the administrative officer thinks the statute or regulation means.’” Id. (internal quotations
7 omitted).

8 Plaintiffs do not dispute that some of the rules are procedural. However, Plaintiffs argue that
9 several provisions of the interim final rules cannot be considered either procedural or interpretative.
10 The Court considers Plaintiffs’ arguments below.

11 i. Applicability Provisions

12 Plaintiffs first argue that the “applicability provisions” of the rules are substantive. The
13 applicability provisions state that the rules are effective immediately and apply to pending proceedings
14 in which a final license has not been issued. Plaintiffs contend that the applicability provisions cannot
15 be regarded as interpretative rules, arguing:

16 [I]n making the Energy Policy Act’s new rights available to pending license proceedings as
17 well as new ones, even though the Act clearly did not so provide, Interior did not merely
18 determine ‘what the law already is.’ Rather, it made a decision that affected the substantive
rights of the parties, a decision that should only have been made subsequent to full notice and
comment.

19 (Pls.’ Opp. at 20) (internal citations omitted).

20 In response, Defendants note that Congress made the Energy Policy Act of 2005 effective
21 immediately and that Congress provided that the rules would be applicable to “license applicants”
22 without qualification. Defendants argue that by applying the rules to pending license proceedings,
23 they “simply honored a statutory requirement, and therefore the provision is interpretative.” (Defs.’
24 Reply at 7).

1 The Court finds that the applicability provisions are interpretative rules and therefore exempt
2 from the APA's notice and comment requirements. These provisions represent Defendants'
3 interpretation of whether Section 241 of the Energy Policy Act applies only to new license applicants
4 or to pending license applicants. The question of whether this interpretation would result in an
5 impermissible retroactive application of the statute presents a different question, which is addressed
6 Section 2 of this Order.

7 ii. Standards Used by Departments To Decide Whether to Adopt Proposed
8 Alternative Conditions or Fishway Prescriptions

9 As discussed earlier, the Energy Policy Act established a new section 33 of the FPA. Section
10 33 allows parties to a license proceeding to propose alternative conditions or fishway prescriptions to
11 be included in hydropower licenses. Under the new section, the secretary of the appropriate
12 department must determine whether to accept the proposed condition or fishway prescription. The
13 statute provides that the secretary must make this determination "based on substantial evidence
14 provided by the license applicant, any other party to the proceeding, or otherwise available to the
15 Secretary." Pub. L. 109-58, § 241(c).

16 Section 33 specifies that the secretary must consider: (1) whether an alternative condition
17 would provide for the adequate protection and utilization of the reservation, or whether an alternative
18 fishway prescription would be no less protective than the fishway initially prescribed by the secretary;
19 (2) whether the alternative will cost significantly less to implement than the condition or fishway
20 prescription initially required by the secretary; and (3) whether the alternative will result in improved
21 operation of the project works for electricity production compared to the condition or fishway
22 prescription initially required by the secretary.

23 The interim final rules issued by Defendants describe how the secretary of the appropriate
24 department will decide whether to accept a proposed alternative condition or fishway prescription
25 under the new Section 33. For example, the rules adopted by the Department of Agriculture include

1 sections titled “What will the Forest Service do with a proposed alternative” and “How will the Forest
2 Service analyze a proposed alternative and formulate its modified condition.” See 7 C.F.R. §§ 1.672 -
3 73; see also 43 C.F.R. §§ 45.72 - 73 (setting forth similar rules for Bureau of Land Management); 50
4 C.F.R. §§ 221.72 - 73 (setting forth similar rules for National Marine Fisheries Service).

5 Plaintiffs argue that these rules “describe substantive standards for deciding whether or not to
6 adopt an alternative prescription or condition.” (Pls.’ Opp. at 18). In response, Defendants argue that
7 the rules track the language of the statute and explain what factors the secretary of the appropriate
8 department must take into account under the new law in analyzing a proposed alternative condition or
9 prescription.

10 As Defendants suggest, the rules implementing Section 33 closely track the statutory
11 requirements established by Congress. The rules describe what factors the appropriate secretary must
12 consider under the law in analyzing a proposed alternative condition or prescription, along with a
13 description of the procedures that will be followed in this process. The Court finds that these rules are
14 interpretative to the extent that they describe what the statute requires, as well as procedural to the
15 extent that they describe what procedures the departments will follow in considering alternative
16 conditions or prescriptions. Because these rules are interpretative and procedural, they are not subject
17 to the APA’s notice and comment requirements.

18 iii. Failure to Make Provisions for Commenting on Proposed Alternative
19 Conditions or Prescriptions in Pending Cases

20 Plaintiffs also suggest that the rules violate the APA’s notice and comment requirements
21 because the rules “make no provision for comment on proposed [alternative conditions or fishway
22 prescriptions] in pending cases.” (Pls.’ Opp. at 18). In response, Defendants note that Plaintiffs “fail
23 to explain or provide any authority supporting their contention that the Departments’ failure to publish
24 a regulation equates to substance and therefore can constitute a violation of the APA notice-and-
25

comment requirements.” (Defs.’ Reply at 8). Defendant also note that nothing in the rules prohibits anyone from submitting comments on proposed alternatives.

The Court agrees with Defendants. It is difficult to conceive how the rules could violate the APA’s notice and comment requirements due to Defendants’ failure to include certain provisions in the rules. In any case, Plaintiffs cite no authority for such a proposition.

iv. Limits on Participation in Hearings

Plaintiffs next suggest that the rules are substantive because “[t]hey preclude anyone who is not already a party to a license proceeding from intervening in a hearing, even though the deadline for intervention may have closed long in the past.” (Pls.’ Opp. at 18). In response, Defendants note that the statute explicitly provides that “[t]he license applicant and any party to the proceeding shall be entitled” to a trial-type hearing. Pub. L. 109-58, § 241(a) & (b). As a result, Defendants argue that this provision is interpretive because it tracks the statute’s limitation of participation in hearings to “parties” to the proceedings.

The Court agrees with Defendants that this provision is interpretative and therefore exempt from the APA’s notice and comment requirements. Plaintiffs’ argument goes more to the issue of whether the rules are impermissibly retroactive as applied to pending license proceedings, rather than to the question of whether the rules are interpretative or substantive. The retroactivity issue is addressed in Section 2 below.

v. ALJ’s Powers

Plaintiffs also argue that the rules are substantive because they “render Administrative Law Judge (“ALJ”) factual decisions ‘final,’ removing significant regulatory authority from the agency and placing it in the hands of the ALJ.” (Pls.’ Opp. at 18).

Section 241(a) and (b) of the Energy Policy Act provides that a license applicant and any party to a license proceeding:

1 [S]hall be entitled to a determination on the record, after opportunity for an agency trial-type
2 hearing of no more than 90 days, on any disputed issues of material fact with respect to such
3 [conditions or fishways]. All disputed issues of material fact raised by any party shall be
4 determined in a single trial-type hearing to be conducted by the relevant resource agency

5 Pub. L. 109-58, §§ 241(a) and (b).

6 Plaintiffs appear to suggest that the rules are substantive because they provide that an ALJ will
7 conduct the “trial-type” hearings required by the Act and that the ALJ’s factual determinations would
8 be unappealable. As noted above, however, the Energy Policy Act explicitly provides that “[a]ll
9 disputed issues of material fact raised by any party shall be determined in a single trial-type hearing”
10 and makes no provision for appeals of that determination. By making the ALJ’s decision on factual
11 issues final, it appears that the departments are simply interpreting what Congress has mandated and
12 establishing agency procedures for fulfilling this mandate.

13 Plaintiffs also argue that the rules are substantive because they provide for consolidated
14 hearings in which “an ALJ from one department will be empowered to make a final decision with
15 respect to the factual bases of prescriptions and conditions issued by another agency.” (Pls.’ Opp. at
16 18). Plaintiffs argue that “[s]uch changes in the identity of the decisionmaker remove the rules from
17 the scope of the ‘procedural’ rule exception.” *Id.* Plaintiffs also suggest that the Energy Policy Act
18 prohibits consolidated hearings, noting that the new law provides that the trial-type hearings are “to be
19 conducted by the relevant resource agency.” Pub. L. 109-58, § 241(a).

20 To the extent the rules permit consolidated hearings, the Court regards the rules as procedural.
21 Much like the Federal Rules of Civil Procedure permit trial courts to consolidate related cases, the
22 apparent purpose of this rule is to promote procedural efficiency and to help ensure that multiple ALJs
23 are not required to hold multiple trial-type hearings on identical factual issues. *See* 7 C.F.R. § 1.623,
24 43 C.F.R. § 45.23; 50 C.F.R. § 221.23.
25

vi. Failure to Specify Who Has the Burden of Proof in Trial-Type Hearings

Finally, Plaintiffs argue that the rules are substantive because they fail to specify which party will bear the burden of proof at the agency trial-type hearings. The rules expressly leave this question open, stating “[c]omments are sought on the separate question of who bears the burden of proof.” 70 Fed. Reg. at 69813. In a footnote in their reply brief, Plaintiffs argue that the failure to establish who bears the burden of proof is a substantive rule because “it merely delegates this important decision to the ALJ conducting the hearing.” (Pls.’ Reply at 9 n.8). Again, however, Plaintiffs have not provided any authority to support the proposition that an agency’s failure to issue a particular rule may constitute a violation of the APA’s notice and comment requirements.

B. Good Cause Exception

Plaintiffs also argue that the interim final rules do not fall within the “good cause” exception to the APA’s notice and comment requirements. However, because the Court finds that the rules are exempt from the notice and comment requirements as procedural and interpretative rules, it is not necessary to determine whether the rules would also be exempt from prior notice and comment under the good cause exception.

2. Retroactive Effect of Rules

The Court next considers Plaintiffs’ claim that the rules would result in an impermissible retroactive application of the Energy Policy Act because the rules apply the provisions of Section 241 to hydropower license proceedings that were pending at the time of the law’s enactment.

Courts apply a two-step test to determine whether a statute’s application is unlawfully retroactive. This two-step process was described as follows in Landgraf v. USI Film Products, 511 U.S. 244 (1994):

When a case implicates a federal statute enacted after the events in suit, the court’s first task is to determine whether Congress has expressly prescribed the statute’s proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party

1 possessed when he acted, increase a party's liability for past conduct, or impose new duties
2 with respect to transactions already completed.

3 Id. at 280.

4 A. Whether Congress Expressly Prescribed Section 241's Reach

5 As noted above, the first step in the Landgraf test is to determine whether Congress "has
6 expressly prescribed the statute's proper reach." Id. at 280. Here, the Court finds that Congress did
7 not expressly prescribe whether the new law would apply to license proceedings that were pending
8 when the statute was enacted.

9 As Defendants note, Congress did not specify an effective date of the Energy Policy Act.
10 Under normal rules of statutory construction, the legislature's silence means that the new law took
11 effect upon enactment. United States v. Shaffer, 789 F.2d 682, 686 (9th Cir. 1986) ("In the absence
12 of an express provision in the statute itself, an act takes effect on the date of its enactment."").
13 However, the fact that the new law took effect upon enactment does not answer the question of
14 whether Congress clearly prescribed that the law would apply to license proceedings that were
15 pending at the time the statute was enacted. See, e.g., Landgraf, 511 U.S. at 257 (noting that "a
16 statement that a statute will become effective on a certain date does not even arguably suggest that it
17 has any application to conduct that occurred at an earlier date."").

18 Defendants argue that Congress "unambiguously mandated" that the new law would apply to
19 any pending license proceedings. (Opening Brief at 14). To support this contention, Defendants note
20 that Section 241 provides that the new trial-type hearings would be available to "the license applicant
21 and any party to the proceeding." Pub. L. 109-58, § 241(a) & (b). Defendants also note that the
22 provisions allowing parties to propose alternative conditions or fishway prescriptions applies to "the
23 license applicant or any other party" to the proceeding. Id. § 241(c). Defendants argue that by using
24 the term "license applicant," Congress expressly provided that the new provisions would apply to any
25 pending license proceedings in which a license had not yet been issued.

1 For their part, Plaintiffs argue that the language of Section 241 suggests that Congress only
2 intended that the new right for trial-type hearings would apply to license proceedings initiated after the
3 statute's effective date. For example, Plaintiffs note that Congress provided that trial-type hearings
4 would be held "within the time frame established by [FERC] for each license proceeding." *Id.* §
5 241(a) & (b). Plaintiffs argue that where the departments "have already issued preliminary
6 prescriptions or conditions, or where the NEPA process has already begun, it is impossible to comply
7 with the requirement as the 'time frame' that has already been 'established by the Commission' will
8 necessarily be disrupted." (Pls.' Opp. at 10). In response, Defendants argue that the language in the
9 statute simply means that FERC has the authority to adjust the schedule for license proceedings to
10 accommodate potential conflicts in the process as a result of the new law.

11 The Court is not persuaded by either side's arguments. Section 241 does not include a clear,
12 express statement as to whether the provisions of the new law apply to pending license proceedings or
13 only to license proceedings initiated after the law was enacted. Therefore, the Court must proceed to
14 the second step of the Landgraf analysis to determine whether applying the rules to pending license
15 proceedings would give the statute an impermissible retroactive effect.

16 B. Retroactive Effect

17 Under the second step of the Landgraf test, "the court must determine whether the new statute
18 would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted,
19 increase a party's liability for past conduct, or impose new duties with respect to transactions already
20 completed." Landgraf, 511 U.S. at 280. The Landgraf Court noted that determining whether a
21 statute is impermissibly retroactive "is not always a simple or mechanical task." *Id.* at 268. The Court
22 stated:

23 A statute does not operate "retrospectively" merely because it is applied in a case arising from
24 conduct antedating the statute's enactment, or upsets expectations based in prior law. Rather,
25 the court must ask whether the new provision attaches new legal consequences to events
completed before its enactment. The conclusion that a particular rule operates "retroactively"
comes at the end of a process of judgment concerning the nature and extent of the change in

1 the law and the degree of connection between the operation of the new rule and a relevant past
 2 event. Any test of retroactivity will leave room for disagreement in hard cases, and is unlikely
 3 to classify the enormous variety of legal changes with perfect philosophical clarity. However,
 4 retroactivity is a matter on which judges tend to have “sound . . . instincts[s],” and familiar
 considerations of fair notice, reasonable reliance, and settled expectations offer sound
 guidance.

5 Id. at 269-70 (internal citations omitted).

6 Plaintiffs have offered several arguments to support their claim that the new rules result in an
 7 impermissibly retroactive application of Section 241. The Court considers each argument below.³

8 i. Reopening “Finalized” Conditions and Prescriptions

9 First, Plaintiffs maintain that the new rules would have an impermissible retroactive effect
 10 because they would allow license applicants to reopen “finalized” conditions and prescriptions in
 11 pending license proceedings. Plaintiffs note that after the Departments of Interior, Agriculture, or
 12 Commerce file conditions or prescriptions for a license application, those conditions or prescriptions
 13 must be included in any final license issued by FERC. See, e.g., 70 Fed. Reg. at 69806 (noting that a
 14 department’s “conditions and prescriptions must be incorporated by FERC into any hydropower
 15 license it issues under the FPA.”). Plaintiffs maintain that allowing license applicants to propose
 16 alternative conditions or prescriptions or to request hearings in pending proceedings in which the
 17 Departments have already filed their conditions or prescriptions will unfairly reopen previously settled
 18 issues and will attach new legal consequences to events that were completed before the Energy Policy
 19 Act was adopted. Plaintiffs also suggest that allowing license applicants to propose alternatives or to
 20 request hearings in pending proceedings will require Plaintiffs to “devote additional time and
 21 unanticipated resources to these processes” and will create “new burdens and disabilities with respect
 22 to transactions already complete.” (Pls.’ Opp. at 14).

24
 25 ³ In evaluating Plaintiffs’ arguments, the Court has considered the declarations and exhibits
 that Plaintiffs have submitted in support of their motion for summary judgment.

1 In response, Defendants argue that conditions or prescriptions cannot be regarded as settled,
2 completed transactions until they are actually included in a final FERC license order. Defendants
3 maintain that “[t]here is nothing final or settled about conditions and prescriptions unless and until
4 FERC makes a decision on the license application with the conditions and prescriptions” and that
5 “[e]ven mandatory conditions and prescriptions filed by the Departments have no legal force or effect
6 until FERC makes a decision on the application.” (Defs.’ Reply at 18). Defendants note that after
7 conditions or prescriptions are filed by the Departments, FERC may still decide not to issue a license.
8 See, e.g., Escondido Mut. Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765, 778 n.20
9 (1984). In addition, Defendants maintain that conditions and prescriptions may be amended before a
10 license issues if new information comes to light.

11 In essence, Plaintiffs argue that before the Energy Policy Act was adopted, they could expect
12 that once the Departments filed conditions or prescriptions for pending hydropower license
13 applications, those conditions or prescriptions would not be subject to modification and would be
14 included in any final license issued by FERC. However, a statute does not operate retroactively
15 “merely because it . . . upsets expectations based in prior law.” Landgraf, 511 U.S. at 269. Instead,
16 the court must consider “whether the new provision attaches new legal consequences to events
17 completed before its enactment,” taking into account “familiar considerations of fair notice, reasonable
18 reliance, and settled expectations.” Id. at 270.

19 While the Court is not unsympathetic to Plaintiffs’ arguments, the Court agrees with
20 Defendants that conditions and prescriptions that have not been included in a final FERC license
21 cannot be regarded as completed events that give rise to the type of settled expectations protected
22 under Landgraf. There is no dispute that until the conditions or prescriptions are included in a final
23 FERC license, they have no legal force or effect. Applying the provisions of Section 241 to pending
24 proceedings in which conditions or prescriptions have already been filed will not increase Plaintiffs’
25 liability for past actions, nor will these provisions impair any vested rights. Plaintiffs suggest that the

1 rules will impose new duties or obligations on them. However, as Defendants note, the rules “do not
2 compel Plaintiffs to request a hearing, to intervene in a hearing, to submit an alternative, or to do
3 anything else.” (Defs.’ Opp at 19). Although Plaintiffs may choose to devote additional time and
4 resources to license proceedings as a result of the rules, “regulations are not retroactive merely
5 because they require a change in existing practices.” American Mining Cong. v. EPA, 965 F.2d 759,
6 770 (9th Cir. 1992).

7 ii New Rights

8 Plaintiffs also argue that the rules cannot be permissibly applied to pending license proceedings
9 because the rules give “a party in a pending proceeding a new right that previously had not been
10 available that prejudices the rights of other parties.” (Pls.’ Opp. at 14). Plaintiffs suggest that the
11 rules are unlawfully retroactive because they “adversely affected the resource agencies’ and
12 intervenors’ ‘prospects for success’ in achieving their goals.” Id. at 15. Plaintiffs also assert that
13 “courts have – without exception – prohibited statutes from operating to give parties new rights, or
14 close off others, in an ongoing adjudicative proceeding.” (Pls.’ Reply at 6).

15 As Defendants note, however, the rules provide that any party to a pending license proceeding
16 may request a hearing or propose an alternative condition or prescription. Because the rules do not
17 provide one party with rights that are unavailable to other parties, the rules on their face do not appear
18 to prejudice only one side in pending proceedings.

19 More fundamentally, Plaintiffs’ contention that a statute may never operate to “give parties
20 new rights, or close off others, in an ongoing adjudicative proceeding” is an overstatement. This point
21 is illustrated by Southwest Center for Biological Diversity v. United States Department of Agriculture,
22 314 F.3d 1060 (9th Cir. 2002). In that case, the plaintiff filed suit under the Freedom of Information
23 Act (FOIA) to obtain information from the Department of Agriculture. While the lawsuit was
24 pending, Congress enacted a statute that gave the agency the right to withhold some of the
25 information sought by the plaintiff. Applying the new law to the pending proceeding, the district court

denied the plaintiff's FOIA request. The Ninth Circuit affirmed the district court's ruling, noting that "[s]urely the [plaintiff's] expectation of success in its litigation is not the kind of settled expectation" protected by Landgraf. Id. at 1062 n. 1. Similarly, the Court does not regard Plaintiffs' concerns that the rules may reduce their prospects of success in ongoing license proceedings to be the type of "settled expectation" protected by Landgraf.

iii. Effect on Intervention Decisions

Plaintiffs also argue that the rules are impermissibly retroactive because they attach a new legal consequence to their earlier decisions not to intervene in certain hydropower license proceedings. Plaintiffs note that "under the rules, unless an entity is already a party to a license proceeding, it cannot intervene in a request for a hearing" to resolve issues of disputed fact with respect to conditions or prescriptions. Plaintiffs argue that "[a]ppplied retroactively . . . this rule can significantly affect a party's rights long after the opportunity to intervene has passed. Parties may well have made different decisions with respect to intervention had they known that they would be barred from participation at a later critical stage of the process." (Pls.' Opp. at 15).

Section 241 and the rules issued by Defendants provide: (1) the license applicant and "any party to the proceeding" may request a trial-type hearing on disputed fact issues; and (2) the license applicant or "any other party to the license proceeding" may propose an alternative condition or fishway prescription. To become a "party" to a license proceeding, a person or organization must file a motion to intervene. According to Plaintiffs:

Any entity seeking party status must do so within a specific time after the license application is accepted by FERC; once that time is passed, FERC will only permit intervention upon a showing of good cause. 18 C.F.R. §§ 5.23, 385.214.

(Pls.' Opp. at 3).

Plaintiffs have offered a declaration from Robbin Marks of American Rivers stating that her organization "most certainly" would have intervened in two pending hydropower license proceedings if they had known that the license applicants would seek to raise "major policy issues concerning the

1 scope of resource conditions” in the trial-type hearings authorized by Section 241. See Marks Decl.
2 ¶¶ 13, 15. Ms. Marks states that American Rivers did not intervene in these proceedings earlier due to
3 resource constraints. Id. ¶¶ 10, 14.

4 In response, Defendants argue:

5 Plaintiffs are well aware that failure to intervene in a license proceeding has serious
6 consequences. For instance, failure to intervene in the licensing proceeding also prohibits that
7 party from seeking judicial review of any aspect of that license in court. 16 U.S.C. § 8251.
8 Similarly, Plaintiffs were on notice that intervention is a pre-requisite for requesting rehearing
9 of a FERC order. Id. Thus, if Plaintiffs were remotely interested in the outcome of a
10 particular license proceeding, they would have intervened. To suggest that Plaintiffs would
11 seek intervention in a trial-type hearing that concerns a narrow disputed fact, in a license
12 proceeding that was not worthy of intervention in the first place simply defies logic.

13 (Defs.’ Reply at 9-10).

14 The Court agrees with Defendants. Before the Energy Policy Act was adopted, an individual
15 or organization faced serious legal consequences for choosing not to intervene in a license proceeding.
16 Perhaps most notably, failing to intervene meant that an individual or organization could not seek
17 judicial review of the final license order. Although Plaintiffs have offered declarations stating that
18 certain organizations “most certainly” would have intervened in particular license proceedings if they
19 had known that license applicants would attempt to use the trial-type hearings allowed by Section 241
20 to resolve “major policy issues,” these assertions are speculative and conclusory at best.⁴ In effect,
21 Plaintiffs are maintaining that their pre-Act decisions not to intervene in certain license proceedings
22 would have been different if trial-type hearings had been available at the time to resolve disputed
23 issues of fact with respect to conditions or prescriptions. The Court cannot conclude that any party
24 would have reasonably relied on the unavailability of such hearings as the reason for a pre-Act decision
25 not to intervene in a license proceeding.

23 ⁴ Speculative and conclusory evidence is not sufficient to create a genuine issue of material
24 fact to preclude summary judgment. See, e.g., Anheuser-Busch, Inc. v. Natural Beverage Distribs., 69
25 F.3d 337, 345 (9th Cir. 1995); Nolan v. Cleland, 686 F.2d 806, 812 (9th Cir. 1982). It should also be
noted that Section 241 only authorizes trial-type hearings to resolve disputed issues of material fact,
not disputed issues of policy.

1 In any case, as Plaintiffs acknowledge, FERC regulations provide that a non-party to a license
2 proceeding may seek leave to intervene on an untimely basis for good cause. See 18 C.F.R. §
3 385.214. If any of the Plaintiffs felt that it was essential to intervene in specific license proceedings
4 after the interim final rules were adopted, Plaintiffs had the opportunity to seek leave to intervene
5 under this provision. There is no indication that any Plaintiffs sought to do so.

6 iv. Impact on Settlements

7 Plaintiffs next argue that applying the rules to pending license proceedings would upset
8 settlement agreements that Plaintiffs entered into before the new law was enacted. Specifically,
9 Plaintiffs assert:

10 [T]he regulations impact settlements that may have been executed long before the Energy
11 Policy Act was enacted. The parties negotiated and entered into such settlements based on the
12 law at the time. Had plaintiffs known that new rights would become available to license
applicants later in the process, their strategies and the agreements themselves may have been
different.

13 (Pls.' Opp. at 15)

14 To support this assertion, Plaintiffs offer declarations from Brett Swift of American Rivers and
15 Charlton Bonham of Trout Unlimited. Both individuals describe settlements that their organizations
16 executed in connection with hydropower license proceedings before the new law was adopted. Mr.
17 Swift and Mr. Bonham state that their strategies or tactics used in negotiating the settlements, or the
18 content of the agreements themselves, may have been different if they had known that the license
19 applicants could request hearings or propose alternative conditions or prescriptions under Section 241.

20 In response, Defendants argue that Plaintiffs' settlement agreements do not constitute the type
21 of "settled expectations" protected under Landgraf. Defendants state:

22 Plaintiffs neglect to mention that settlements are not final and enforceable [until] FERC makes
23 a decision on the associated application. Thus, Plaintiffs, like all parties to a FERC settlement,
24 run the risk that the law or conditions may change before FERC makes a decision on the
25 application. Any party to a FERC settlement may seek to amend its provisions, or possibly
withdraw, prior to that decision, and parties always run the risk that FERC might decide not to
issue a license at all. Needless to say, Plaintiffs cannot fairly argue that a settlement

1 agreement[], part of an application pending before FERC, constitutes a legitimate expectation
2 that warrants protection.

3 (Defs.' Reply at 19-20).

4 Plaintiffs do not dispute Defendants' contention that the settlement agreements are not final
5 and enforceable until FERC issues a decision on the pending license application. Instead, Plaintiffs
6 argue that Defendants ignore that "the very purpose of the judicial prohibition on retroactivity is to
7 prevent the disruption caused by unannounced changes in the law" and that "[i]f everyone 'ran the
8 risk' that the laws would change and alter the consequences of past actions, there simply would be no
9 retroactivity jurisprudence at all." (Pls.' Reply at 7).

10 However, as noted earlier, a law is not unlawfully retroactive merely because it upsets
11 expectations based in prior law. Landgraf, 511 U.S. at 269. The Ninth Circuit's recent decision in
12 Polone v. Commissioner of Internal Revenue, 449 F.3d 1041 (9th Cir. 2006), highlights this point. In
13 Polone, the plaintiff had settled a defamation lawsuit for \$4 million and received payments in four
14 installments of \$1 million. After the settlement agreement was executed, but before the plaintiff had
15 received three of his four payments under the agreement, Congress enacted a new statute that treated
16 damages in defamation actions as taxable income. The plaintiff argued that the new tax law could not
17 be applied to payments he received after the law changed, since the settlement of his defamation suit
18 had been "finalized" before the enactment of the statute. The Ninth Circuit rejected this argument.
19 Although the Ninth Circuit noted that "the settlement contract may have been 'finalized' in the sense
20 that both parties signed it," the court held that the agreement was not "fully consummated" at the time
21 the change in law took effect. Id. at 1047.

22 Similarly, the settlement agreements cited by Plaintiffs cannot be regarded as the type of
23 completed transactions that are protected under Landgraf. Plaintiffs do not dispute that these
24 agreements are not final or enforceable until FERC issues a decision on the associated license
25 application. Although Plaintiffs may have adopted different negotiation strategies or bargained for

1 different agreements if they had known that Section 241 would be enacted, the same would be true of
2 the plaintiff in Polone – had he known that Congress would change the law regarding taxation of
3 damages in defamation actions, he most likely would have negotiated a different settlement agreement
4 as well. This consideration is not sufficient to support a finding of retroactive effect.

5 v. Ability to Comment

6 Finally, Plaintiffs argue that “under the standard FPA process, preliminary prescriptions and
7 conditions receive extensive input from license parties and the public. Where a party proposes
8 alternatives to such terms that were final, or were close to final, however, no such opportunity is
9 afforded by the rules. The previous hard work by plaintiffs and others in advocating for protective
10 license terms can be undone with no opportunity to be heard.” (Pls.’ Opp. at 15).

11 Plaintiffs appear to be arguing that the rules are impermissibly retroactive because they may
12 allow Plaintiffs’ earlier efforts to obtain protective license terms to be reversed without an opportunity
13 to be heard. As noted earlier, however, a statute does not operate retroactively “merely because it . . .
14 upsets expectations based in prior law.” Landgraf, 511 U.S. at 269. In any case, Defendants note that
15 the rules do not preclude Plaintiffs from commenting on proposed alternatives or prescriptions.
16 Indeed, Plaintiffs themselves have already submitted comments on proposed alternative conditions or
17 prescriptions.

18 **Conclusion**

19 Consistent with the discussion above, the Court finds that Defendants did not issue the
20 challenged rules in violation of the APA’s notice and comment requirements. The Court finds that
21 these rules are exempt from the notice and comment requirements because they are procedural and
22 interpretative rules. The Court also finds that the rules do not result in an impermissible retroactive
23 application of the Energy Policy Act.

24 Therefore, the Court: (1) GRANTS Defendants’ motion to dismiss Plaintiffs’ claim that
25 Defendants issued the rules in violation of the APA’s notice and comment requirements; (2)

1 GRANTS summary judgment in favor of Defendants on Plaintiffs' claim that the rules result in an
2 unlawfully retroactive application of the Energy Policy Act of 2005; and (3) DENIES Plaintiffs'
3 motion for summary judgment.

4 The clerk is directed to send copies of this order to all counsel of record.

5 Dated: October 3, 2006

6 s/Marsha J. Pechman

7 Marsha J. Pechman

8 United States District Judge
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